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in the

Supreme Court

of the

United States

OCTOBER TERM, 1970

70-167

No. ~~1205~~

B. B. SIGELBAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA and
WILLIAM P. BUSHMIAER, Special Agent
of the Internal Revenue Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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of the Internal Revenue Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, B. B. Sigelbaum, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on January 14, 1971.

OPINION BELOW

The Opinion of the United States Court of Appeals is not yet officially reported, but appears as Appendix A herein.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 14, 1971. (Appendix A) A timely Petition for Rehearing was filed on January 25, 1971, and was denied on February 18, 1971. (Appendix B) The jurisdiction of this Court is invoked pursuant to Title 28 United States Code §1254(1).

QUESTIONS PRESENTED

I.

In the setting wherein a person had been the victim of an illegal electronic surveillance by the Federal Bureau of Investigation and the recipient of a letter from the Internal Revenue Service stating that he failed to maintain certain financial records and that unless he complied with the regulations he was subject to criminal prosecution, was it "perfectly clear" under the guidelines of *Hoffman vs. United States*, 341 U.S. 479 (1951) that answers to questions and the production of his personal financial records for the Internal Revenue Service could not "possibly have a tendency to incriminate" him?

II.

May a witness summoned before the Internal Revenue Service invoke the Fifth Amendment privilege when the examination relates to another person?

III.

Must a proceeding have "dominant criminal overtones" before a person is entitled to invoke the privilege against self-incrimination?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Five:

> "No person . . . . . shall be compelled in any criminal case to be a witness against himself . . . . . "

STATUTORY PROVISIONS INVOLVED

Title 26 United States Code §7402(b):

> "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Title 26 United States Code §7602:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such injury;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Title 26 United States Code §7604

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. — Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

STATEMENT OF THE CASE

On October 16, 1969, under the authority of Title 26 United States Code §7602, William P. Bushmiaer, Special Agent of the Intelligence Division[1] of the Internal Revenue Service, issued a summons in the nature of a subpoena duces tecum upon the petitioner, B. B. Sigelbaum, directing him to appear on November 4, 1969, to produce certain personal financial records and to testify in the matter of the income tax liability of Meyer and Thelma Lansky.[2]

In response thereto, Sigelbaum, accompanied by his attorney, appeared at the time and place therein designated and after being duly sworn was advised of his right to refuse to answer any question which may tend to incriminate him. The special agent propounded a series of questions regarding Sigelbaum and financial matters between him and Lansky. In response to each question, other than furnishing his name and address, he declined to answer or produce records on self-incrimination grounds.

On April 7, 1970, pursuant to Title 26 United States Code §7402(b) and §7604, upon the petition of the special agent and the United States of America, the United States District Court directed Sigelbaum to appear on April 16, 1970, and show cause why he should not be compelled to comply with the summons.

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[1]Under Section 601.107 Treasury Regulations on Procedure and Administration (1954 Code) the Intelligence Division is charged with criminal investigations.

[2]Meyer Lansky has been described by the Department of Justice as the financial wizard for the entire underworld. In the May, 1970, Reader's Digest article entitled "The Shocking Success Story of 'Public Enemy No. 1'", Sigelbaum was linked to Lansky in financial transactions through a Miami attorney who at that time was under an income tax indictment.

On the return date Sigelbaum established that the Federal Bureau of Investigation publicly acknowledged that his private office had been under illegal electronic surveillance for a considerable period of time. He further established that on April 4, 1966, he had been served with a notice by the Internal Revenue Service that in its judgment his personal financial records and accounts were inadequate and that "severe penalties are provided in Section 7203 of the Internal Revenue Code for wilful failure of the taxpayer to keep records as required by law and regulations".

The special agent testified that his investigation related solely to Lansky. Although he had no reason to suspect the petitioner of criminal activities, should he discover any, he would, of course, report the matter.

The Trial Court entered an order directing the petitioner to comply with the summons, but stayed it pending appeal. The Court of Appeals for the Fifth Circuit affirmed the Trial Court in a per curiam decision and vacated the stay order forthwith.

On February 23, 1971, the Honorable Hugo L. Black, Associate Justice, stayed all lower court proceedings pending the filing and disposition of this Petition for Writ of Certiorari. (Appendix C)

REASONS FOR GRANTING THE WRIT

The order of the Trial Court and the decision of the Court of Appeals requiring the petitioner to disclose to the Internal Revenue Service personal financial records and to testify concerning financial transactions with Meyer Lansky is in conflict with the decisions of this Court in *Counselman vs. Hitchcock*, 142 U.S. 547 (1892), *In Re Gault*, 387 U.S. 1 (1966), *Hoffman vs. United States*, 341 U.S. 479 (1951), and *McCarthy vs. Arndstein*, 266 U.S. 34 (1924).

ARGUMENT

I.

In the setting wherein a person had been the victim of an illegal electronic surveillance by the Federal Bureau of Investigation and the recipient of a letter from the Internal Revenue Service stating that he failed to maintain certain financial records and that unless he complied with the regulations he was subject to criminal prosecution, was it "perfectly clear" under the guidelines of *Hoffman vs. United States*, 341 U.S. 479 (1951) that answers to questions and the production of his personal financial records for the Internal Revenue Service could not "possibly have a tendency to incriminate" him?

When a trial judge is required to pass upon the propriety of a Fifth Amendment claim, thereby substituting his judgment for that of the witness, he must be sensitive and painstakingly introspective. The trial court must find

from all of the circumstances that the answers to the questions or the production of personal records could not possibly incriminate the witness. *Hoffman vs. United States, supra.*

In the case *sub judice,* the petitioner produced evidence that the Federal Bureau of Investigation publicly acknowledged that its agents, by trespass, illegally installed a microphone in his office and thereafter maintained surveillance for a lengthy period of time (believed to be 27 months). Instead of considering this as a part of the setting and subjectively reflecting upon the government's underlying reasons for this shocking and flagrant breach of the petitioner's First and Fourth Amendment rights, the Court blithely isolated this proof from the petitioner's Fifth Amendment claim with the legalistic but totally inapposite observation that if the petitioner were indicted he could move to suppress illegally obtained evidence. This judicial attitude does not even pay lip service to *Hoffman* and the true spirit of the Fifth Amendment.

Petitioner also established that in 1966, he had been served with an Internal Revenue Service notice that his personal financial records (one of the objects of the summons) failed to comply with the regulations and continued failure would subject him to prosecution under the appropriate Internal Revenue laws. The trial court declined to consider this as a potential hazard to the petitioner, but merely commented in substance that if a person violates the Internal Revenue laws he should expect to be arrested and jailed. The petitioner agrees, but is the evidence in support of his own possible prosecution to be forced from him?

The foregoing were matters in this record at the time of the hearing, but what other factors exist in the petitioner's life that he, and he alone, must evaluate and judge when hailed before the authorities? This may very well have been demonstrated by that which occurred subsequent to the hearing.

For example, several months after the hearing the petitioner's son was served with a grand jury subpoena returnable in the United States District Court for the Central District of California in what appears to be an extensive investigation by the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice of alleged "skimming" activities at the Fremont Hotel in Las Vegas, Nevada.[3] It is believed that this investigation, in part, is to determine whether or not Meyer Lansky had an undisclosed interest in that hotel, and whether or not there existed a conspiracy to evade income taxes and violate the Interstate Travel Act. The government, but not necessarily the special agent, is fully aware that for a period of time in 1967 and 1968, the petitioner received funds from that hotel on behalf of his son. This later occurrence points out the further justification for the petitioner's earlier fears and Fifth Amendment plea, and illustrates the danger of the Court substituting its judgment for that of the witness.

In March, 1971, the petitioner, himself, received a grand jury subpoena returnable in the United States District Court for the Southern District of Florida, requiring his appearance before that body on two occasions. This investigation of alleged "skimming" activities at the Fla-

[3]This was disclosed to the Court of Appeals in the Petition for Rehearing.

mingo Hotel in Las Vegas, Nevada, has recently culminated in an indictment against Meyer Lansky and others.[4] Was this what the petitioner feared?

The mere fact that Special Agent Bushmiaer *personally* was neither investigating the petitioner nor suspected him of any criminal activities is immaterial in determining the validity of Sigelbaum's Fifth Amendment claim. It is obvious that Bushmiaer, being only one individual government employee, could not or did not have knowledge of other relevant possible criminal investigations which may be focusing on or near Sigelbaum.

In any event, it is clear that Sigelbaum's self-incrimination plea was not made in a vacuum. He did not draw the "conjuror's circle around the whole matter by his own declaration". *United States vs. Sullivan*, 274 U.S. 259 (1926)

II.

May a witness summoned before the Internal Revenue Service invoke the Fifth Amendment privilege when the examination relates to another person?

In one of the decisions relied upon by the Court of Appeals for the Fifth Circuit, *Venn vs. United States*, 400 F.2d 207, 5th Cir., 1968, there was involved a self-incrimination claim by a third party witness possessor of certain corporate records which he feared would be used against him in an unrelated criminal anti-trust case in

[4]Superseding or additional indictments are presently under consideration.

which he was a defendant. A close analysis of the *Venn* facts makes it clear that the specific transactions and documents which were ultimately directed to be produced were not remotely involved in the anti-trust case, and, accordingly, *could not possibly incriminate him* in the concurrent anti-trust case.[5]

Regardless of the foregoing, it appears that the only portion of the *Venn* case which may be applicable to this matter and, therefore, form a basis of the Court of Appeals' affirmance is that Sigelbaum, like Venn, was summoned only as a witness. The Court of Appeals noted in *Venn* that this position was like a "middle ground" and was unique.

If the Court of Appeals' judgment means that the Fifth Amendment does not apply to the petitioner because he was a witness, then it is contrary to and inconsistent with *Counselman vs. Hitchcock, supra,* and *McCarthy vs. Arndstein, supra.*

III.

Must a proceeding have "dominant criminal overtones" before a person is entitled to invoke the privilege against self-incrimination?

In affirming, the Court of Appeals relied upon its own decision of *Roundtree vs. United States,* 420 F.2d 845, 5th Cir., 1969, which had as its precursor the case of *Stuart vs. United States,* 416 F.2d 459, 5th Cir., 1959.

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[5]Venn was willing to waive his Fifth Amendment privilege and personally testify about the transactions, rather than submit all the documents demanded by the summons.

In both cases the Fifth Circuit has fashioned what appears to be a new rule of law (at least as it relates to income tax cases), whereby the availability of a self-incrimination claim is to be determined by the nature of the proceedings and whether it has "dominant criminal overtones". *Roundtree* and *Stuart* turned on their own particular facts (as should all Fifth Amendment cases). The petitioner does not suggest that the *result* in either of the foregoing cases is inconsistent with the Fifth Amendment and decisions of this Court. The petitioner, however, disagrees with the reasoning in *Roundtree* and *Stuart* whereby the validity of a Fifth Amendment claim is to be measured by whether or not the proceedings have "dominant criminal overtones", rather than being tested by the overall setting and possible dangers invited by responses to questions. *Hoffman vs. United States, supra.*

In *McCarthy vs. Arndstein, supra,* this Court said:

> " . . . . . The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it . . . . . "

This Court also said in *In Re Gault, supra:*

> " . . . . . However it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked but, upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil

or administrative proceeding, if the statement is or may be inculpatory."

Accordingly, a self-incrimination plea should be upheld irrespective of any matter other than the subjective apprehension of the witness so long as there is a reasonable basis for it.

CONCLUSION

The petitioner respectfully submits that upon a review of the record, this Petition for Writ of Certiorari should be granted, and that the Judgment of the Circuit Court affirming the Judgment of the District Court should be set aside, and the cause remanded with directions to enter an Order denying the government's Petition to Enforce the Internal Revenue Summons.

Respectfully submitted,

E. DAVID ROSEN
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APPENDIX

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29766

UNITED STATES OF AMERICA, and
WILLIAM P. BUSHMIAER, Special Agent of the
Internal Revenue Service,
Petitioners-Appellees,

versus

B. B. SIGELBAUM,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(January 14, 1971)

Before BROWN, Chief Judge, TUTTLE and GODBOLD, Circuit Judges.

PER CURIAM: The Judgment of the trial court is AFFIRMED. *Venn v. United States*, 400 F.2d 207, 5 Cir., 1968; *United States v. Roundtree*, 420 F.2d 845, 5 Cir., 1969.

The stay order entered by the trial court staying the effect of its judgment of April 16, 1970, is hereby VACATED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

February 18, 1971

EDWARD W. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

TO ALL PARTIES LISTED BELOW

Re: No. 29766 — U. S. A. and Bushmiaer vs. B. B. Sigelbaum

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Frances Wolff

Deputy Clerk

cc: Mr. E. David Rosen
Ms. Lavinia Redd
Hon. Johnnie M. Walters

APPENDIX "C"

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1970

B. B. SIGELBAUM,

Petitioner,

vs.

UNITED STATES, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner and the advice of the Solicitor General that he does not oppose the application,

IT IS ORDERED that all lower court proceedings be, and they are hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari.

Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to remain in effect pending the issuance of the judgment of this Court.

S/ HUGO L. BLACK

Associate Justice of the Supreme Court of the United States.

Dated this 23d day of February, 1971.